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"Whiskey is for drinking, water is for fighting over." This observation, attributed to Mark Twain, appropriately describes the centuries old struggles surrounding water in California. The allocation of water has influenced population growth, economic development, and environmental health in California. The northern part of California—with plentiful watersheds fed by coastal precipitation and Sierra Nevada Snowmelt—is pitted against the arid, heavily populated southern portion of the state, a leading agricultural region. Both the State Water Project (SWP) and the Central Valley Project (CVP) pump fresh water from the San Francisco Bay Delta (Delta), supplying drinking water for two-thirds of California residents and irrigating over seven million acres of agricultural land.[1] Competition for Delta water resources has decreased wildlife habitat, threatened species extinction, increased the risk of levee failure, and degraded the dependability of the Delta as a reliable source of high quality water.[2]

Policies directing the quantity and timing of water exported out of the delta draw fierce response from stakeholders on all sides of the debate. Multiple California agencies influence the regulation of water in the state while balancing the competing interests at play. This balancing act is often complicated by jurisdictional issues that arise from the Federal Government's operation of the CVP. The Bureau of Reclamation began construction of the CVP in 1937, completing a project that was previously initiated by the state but abandoned during the Great Depression.[3] The CVP and SWP share storage and conveyance infrastructure, meaning that state and federal operations must be closely coordinated.[4] California's agriculture industry, worth nearly fifty billion dollars annually, is heavily dependent on

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1. In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings, 43 Cal. 4th 1143, 1151 (2008).

2. *Id.*

3. ABOUT THE CENTRAL VALLEY PROJECT, http://perma.cc/LNM7-WLX3 (Mar. 23, 2017).

4. *Id.*

CVP and SWP deliveries. Control of these vital water resources is a high priority for many state and federal politicians representing agricultural districts and constituencies. It is no surprise then, that federal legislation often has far-reaching impacts on control over California water.

Multiple federalism issues arise when the competing state and federal interests in California water management collide. The Gaining Responsibility on Water Act (H.R. 23 or Act),[5] now pending before the Committee on Energy and Natural Resources of the U.S. Senate, has set a potential collision course. The Act, sponsored by California Representative David Valadao, a Republican, passed in the House by a 230-190 vote on July 12, 2017.[6] The Act purports to provide drought relief while serving "other purposes," such as managing water transfers via the CVP.[7] Provisions of the bill raise significant questions as to their potential impact on California's sovereign ability to regulate and control water resources within its boundaries, under both state and federal law. The implications of the bill, as now written, can be analyzed through three "prisms" of U.S. Supreme Court precedent. These analyses will address provisions that may displace California's ability to enforce state water law, exempt federal actions from environmental review, and/or commandeer state entities in violation of state sovereignty.

Any resulting conclusions or projections could provide insight into what a final draft might look like and its chances of being signed into law. This investigation will highlight the manner in which legislators use Supreme Court precedent in pursuit of a policy agenda. This legislation demonstrates a clear preference for agricultural and water diverter interests in the California water allocation debate. H.R. 23, in whatever form it may take, will almost certainly attempt to constrain California's ability to manage its water resources in an environmentally protective manner.

Preemption Framework Concerning State Water Law

California v. U.S. is the seminal case regarding the joint obligations on federal and state government regulation of water allocation.[8] The U.S. Bureau of Reclamation (USBR), in its operation of the CVP, sought a permit from the California State Water Resources Control Board (SWRCB) to construct the New Melones Dam and appropriate the subsequently

5. Gaining Responsibility on Water Act, H.R. 23, 115th Cong. (2017).

6. H.R. 23, GAINING RESPONSIBILITY ON WATER ACT, Recorded Vote on July 12, 2017.

7. *Id.*

8. California v. U.S., 438 U.S. 645 (1978).

impounded water.[9] The SWRCB conditioned the grant of the permit on, among other conditions, the USBR first showing firm commitments, or a specific plan, for where and how the impounded water would be used.[10] The U.S. argued, and the Ninth Circuit agreed, that the state could not place conditions on water appropriation permits for USBR projects.[11] At issue was Section 8 of the Reclamation Act of 1902, which declared nothing in the Act would interfere with any state law "relating to the control, appropriation, use, or distribution of water used in irrigation."[12] The Court held that the SWRCB could place conditions on appropriation and distribution permits for USBR projects "which are not inconsistent with congressional provisions authorizing the project in question."[13] The Court later refined its holding, stating that "the [Interior] Secretary should follow state law in all respects not directly inconsistent with these [Congressional] directives."[14] This holding provided Congress with potentially broad authority to preempt state law governing water as long as Congress provided a clear directive to the relevant federal agency.

Subsequent decisions must be analyzed to determine the extent of federal authority to preempt state water law. In *California v.* F.E.R.C., the Court found that minimum flow rates established under Federal Power Act ("FPA") authority preempted higher state-mandated flow rates.[15] The Court held the "other uses" language in Section 27 of the FPA, the so-called "saving clause," demonstrated congressional intent to provide exclusive regulatory authority to FERC regarding water uses that do not implicate proprietary rights:[16]

> Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.[17]

9. *Id.* at 651—52.
10. *Id.* at 652.
11. *Id.* at 645.
12. California v. U.S., 438 U.S. at 650—51 (citing 32 Stat. 390).
13. 438 U.S. at 674.
14. *Id.* at 678.
15. California v. F.E.R.C., 495 U.S. 490, 496 (1990).
16. *Id.* at 505.
17. 16 U.S.C. § 821 (1982).

The Court relied on its interpretation in *First Iowa Hydro-Elec. Co-op. v. Federal Power Commission*, which distinguished Section 27 of the FPA's regulation of "other uses" from Section 8 of the Reclamation Act's "water used in irrigation."[18] The *First Iowa* Court held that Section 27 only protected from supersedure state laws commanding the control, use, appropriation, or distribution of water in irrigation.[19] As such proprietary rights are based in state property law, the *First Iowa* Court found such rights to be saved from FPC preemption.[20] Finding no reason to overturn its own statutory interpretation in *First Iowa*, the Court in *California v.* F.E.R.C. concluded the state minimum flow rates were not proprietary in nature, and thus fell outside of Section 27 protection as intended by Congress in drafting the FPA, and were preempted.[21]

In holding the state minimum flow requirements were preempted by the FPA, *California v.* F.E.R.C. can be used to clarify the scope of the *California v.* U.S. decision. Distinguishing Section 27 of the FPA and Section 8 of the Reclamation Act, the Court stated that the "FPA envisioned a considerably broader and more active federal oversight role in hydropower development than did the Reclamation Act."[22] If the FPA allows for less state authority, it follows that the Section 27 "saving clause" would represent the minimum amount of state authority reserved under Section 8 of the Reclamation Act. As the *California v.* U.S. Court construed Section 8 "in a manner more generous to the States' regulatory powers than was *First Iowa*'s reading of § 27," it can therefore be understood that California laws regarding proprietary water rights are protected from preemption.[23] Such an interpretation would only allow a "clear congressional directive" concerning reclamation projects like the CVP to supersede state laws regarding water allocation decisions.

The *California v.* F.E.R.C. Court referenced a presumption against federal preemption in areas traditionally within states' police powers.[24] The extent by which state water allocation laws might be preempted will therefore turn on the clarity with which congressional purpose was subsequently

18. California v. F.E.R.C, 495 U.S. at 505 (citing First Iowa Hydro-Elec. Co-op. v. Federal Power Commission, 328 U.S. 152, 175 (1946)).

19. 328 U.S. at 175—76.

20. *Id.*

21. California v. F.E.R.C., 495 U.S. 490, 506—07.

22. *Id.* at 504.

23. *Id.* at 491.

24. *Id.* at 497. ("Just as courts may not find state measures pre-empted in the absence of clear evidence that Congress so intended, so must they give full effect to evidence that Congress considered, and sought to preserve, the States' coordinate regulatory role in our federal scheme.").

expressed, and the history of deference to state authority over such allocation.[25]

Application of Preemption Framework to H.R. 23

Whether provisions of H.R. 23 represent a "clear congressional directive" can be assessed using the preemption framework referenced above, established by C*alifornia v*. U.S. and its preceding cases. Section 108 provides in the "Congressional Direction" section that "The Central Valley Project and the State Water Project shall be operated pursuant to the water quality standards and operational constraints described in the 'Principles for Agreement on the Bay-Delta Standards Between the State of California and the Federal Government' dated December 15, 1994 . . ."[26] The immediate use of the "Congressional Direction" language is striking in terms of an express congressional directive. The section then identifies specific water quality standards (WQS) and operational processes by which the projects must operate. The impact of this directive can be evaluated in two parts. First, does a clear congressional directive apply to a purely state-run project such as the SWP? Second, does the directive, as applied to the CVP, conflict with state laws concerning proprietary water rights?

The Court in C*alifornia v*. U.S. focused its analysis exclusively on the controversy surrounding regulatory authority over the New Melones Dam, a federal reclamation project.[27] In allowing California to impose conditions "not inconsistent with clear congressional directives respecting the project," the Court referenced the extent to which a congressional directive might preempt state law.[28] A clear congressional directive does not stand on its own, it must refer to the federal reclamation project at issue.[29] The Court's preemption framework is set within the context of the federal project in question. There is no indication that the clear congressional directive overriding conflicting state law is meant to extend beyond the scope of the

25. U.S. v. California, State Water Res. Control Bd., 694 F.2d 1171, 1176 (1982, 9th Cir.) ("This admonition is particularly applicable in the reclamation context. In this very litigation, the Supreme Court has detailed the long history of 'purposeful and continued deference to state water law by Congress.'").

26. Gaining Responsibility on Water Act, H.R. 23, 115th Cong. § 108(a) (2017).

27. California v. U.S., 438 U.S. 645, 651 (1978).

28. I*d*. at 672.

29. I*d*. at 674. ("not inconsistent with congressional provisions authorizing the project in question.").

project in question. It is thus likely that the mandated WQS and operational processes of Section 108 of H.R. 23 are not applicable to the SWP as a clear congressional directive under *California v.* U.S.

The impact of Section 108 on the CVP will turn on what aspects of California law are implicated by the directive. As the CVP is a federal project, is it clearly the object of the directive, proving analogous to the facts of *California v.* U.S. wherein the federally controlled dam was in dispute.[30] The inquiry should focus on the water uses the directive was intended to affect. If Section 108's requirement to follow the 1994 Bay-Delta agreement pertains to allocation decisions, it is likely they will control. Conversely, if the directive appears to implicate the proprietary water rights, there is an argument to be made that such rights are protected from preemption. The Bay-Delta agreement sets out WQS that set the upper limit of exports as a percentage of Delta in-flow during different periods of the calendar year.[31] This section of the agreement concerns the allocation of water exports to the CVP; exactly the type of use the *California v.* U.S. Court concluded was in the scope of a clear congressional directive's preemptive effect.[32] The deliberate language of Section 108 belies Congressional intent to control in this area of operation. The clear congressional directive applies to a federal project and the allocation and distribution of water therefrom. It is likely that this provision of H.R. 23 will preempt inconsistent state law.

Subsection (b) of Section 108 also raises preemption concerns and requires comparison to the facts of the *California v.* U.S. case. This provision prohibits the state or any federal department from imposing any condition on any water right to protect any species that is affected by operations of the CVP or SWP.[33] This section raises similar concerns to subsection (a) in that it directs the manner with which the State is to operate its own project. Beyond this initial issue, the prohibition of "any condition" poses an analytical challenge to the interpretation of *California v.* U.S. The Court explicitly held that California could impose conditions on the Federal project as long as the conditions did not run afoul of a clear congressional directive.[34] The conditions in *California v.* U.S., which restricted certain uses to protect fish and wildlife, bear similarity to the prohibited class of

30. *Id.* at 674.

31. Principles for Agreement on Bay-Delta Standards Between the State of California and the Federal Government, Water Quality Standards and Operational Constraints, 1—6. 1994.

32. 438 U.S. at 675 ("control, appropriation, use or distribution of water.").

33. H.R. 23, 115th Cong. § 108(b) (2017).

34. 438 U.S. at 676.

conditions outlined in Section 108(b).[35] Despite the similarity to the conditions the Court approved in relation to the New Melones project, H.R. 23 provides a clear congressional directive that would likely preempt California's ability to impose environmentally protective conditions on CVP operations. A potential vulnerability of this provision concerns the scope of the water rights to which the conditions prohibition applies. The language fails to distinguish between appropriative and proprietary water rights in its stipulation that State or Federal department shall not "impose on any water right obtained pursuant to State law."[36] As discussed above, there is a strong argument that proprietary rights remain in the control of State law regardless of a clear congressional directive. If this were the case, the preemption provided by *California v.* U.S. would not apply.

Nondiscretionary Actions Exempt from ESA Consultation

Section 7 of the Endangered Species Act (ESA) requires a federal agency ("action agency") to consult with agencies within the Department of Commerce or the Interior to "insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species."[37] How a federal action is defined and the attendant discretion of the action agency factor into the analysis of whether consultation is required under the ESA. This inquiry was central to the Court's decision in *National Ass'n of Home Builders v. Defenders of Wildlife*, in which the issue of agency discretion was center stage.[38] The *Home Builders* Court addressed the issue of whether consultation was required when the Section 7(a)(2) requirements seemed to conflict with statutory mandates of the Clean Water Act.[39] The conflict concerned the transfer of NPDES authority from the EPA to State officials upon the state satisfying nine criteria demonstrating proper state authority to implement the program.[40] The petitioners argued, and the Court agreed, that the ESA consultation and required no-jeopardy finding would constitute a tenth criteria, effecting an implied repeal of the CWA statutory mandate.[41] The

35. *Id.* at 652.

36. Gaining Responsibility on Water Act, H.R. 23, 115th Cong. § 108(b) (2017)

37. 16 U.S.C. § 1536(a)(2) (1988).

38. Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644 (2007).

39. *Id.* at 649.

40. *Id.* at 649—51.

41. *Id.* at 663.

EPA argued this transfer represented a federal action for which consultation was required under ESA Section 7(a)(2). The Court held Section 7(a)(2) of the ESA only applied to discretionary agency actions, and not to non-discretionary actions required by statute once "specified triggering events have occurred."[42] The court supported this interpretation on regulations implementing Section 7(a)(2) that read, "Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control."[43] Therefore, the Court concluded that the CWA mandated transfer of NPDES authority once the nine statutory factors were met, and that such a transfer of authority was not discretionary, and thus exempt from ESA consultation.[44]

In the aftermath of H*ome* B*uilders*, the critical determination is what constitutes a discretionary agency decision, and how specific a competing statutory mandate must be to exempt Section 7 consultation. Shortly following the disposition of H*ome* B*uilders*, the Ninth Circuit shed light on when an agency decision is discretionary, "When an agency, acting in furtherance of a broad Congressional mandate, chooses a course of action which is not specifically mandated by Congress and which is not specifically necessitated by the broad mandate, that action is, by definition, discretionary and is thus subject to Section 7 consultation."[45] The Ninth Circuit declined to read H*ome* B*uilders* to "immunize discretionary agency actions simply because they are taken in pursuit of a nondiscretionary goal."[46] Under this interpretation, specific congressional mandates directing nondiscretionary actions would not require consultation, while an agency choosing specific actions to implement broad statutory goals would require a Section 7 no-jeopardy finding.[47] Exemption from Section 7(a)(2) consultation will turn on the extent to which Congress has specified how the agency must fulfill its various obligations.[48]

Application of nondiscretionary exemption to H.R. 23

The discretionary authority of the Bureau of Reclamation and therefore its obligation to consult under ESA Section 7(a)(2) is challenged by

42. I*d*. at 669.

43. 50 CFR § 402.03 (2016).

44. 551 U.S. 644, 666 (2007).

45. Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 524 F.3d 917, 929 (2008, 9th Cir.).

46. I*d*.

47. I*d*.

48. I*d*.

numerous sections of H.R. 23. Section 103 requires the Secretary, upon request of the contractor, to "renew any existing long-term repayment or water service contract that provides for the delivery of water from the Central Valley Project for a period of 40 years."[49] The threshold inquiry is whether a contract renewal is an "agency action" within the scope of Section 7(a)(2) consultation. "Agency action" has been defined broadly, such that negotiating and executing contracts is "agency action."[50] Water deliveries from the CVP have a direct impact on the amount of water that remains in the Delta and its tributaries, thus affecting habitat and species health. A decision to renew such a contract for forty years would certainly affect the Delta Smelt. Furthermore, this is not the first attempt to ensure the renewal of water delivery contracts free of Section 7 consultation. In NRDC *v.* J*ewell*, the Ninth Circuit held that as the Bureau of Reclamation had "some discretion" in the decision to renew settlement contracts, Section 7 consultation was required.[51] At issue were forty-year settlement contracts pertaining to the CVP between the Bureau and senior rights holders.[52] NRDC contended that the Bureau was required to consult with FWS pursuant to Section 7 prior to renewing the contracts because of the potential impact to the Delta Smelt.[53] The court, on rehearing en banc, reversed its prior decision, finding the Bureau was not so constrained by the settlement contract provisions such that it lacked all discretion to act for the protected species' benefit.[54] The requirement of consultation does not depend on the degree of discretion, but whether the agency has any discretion at all to act on behalf of species protection.[55] This interpretation can be applied to Section 103's mandated contract renewal to find how constraining it is of the Secretary's discretion.

The contracts at issue in NRDC *v.* J*ewell* contained provisions locking in quantities of water to be allocated for the duration of the contract and subsequent renewals.[56] This was argued to constrain the Bureau's ability to renegotiate new terms upon renewal, an argument ultimately dismissed by

49. H.R. 23 § 103(a).

50. NRDC v. Houston, 146 F.3d 1118, 1125 (9th Cir. 1998) citing 50 C.F.R. § 402.02 ("Action means all activities . . . . Examples include, but are not limited to: . . . the granting of licenses, contracts, leases . . . .").

51. NRDC v. Jewell, 749 F.3d 776, 785 (9th Cir. 2014).

52. I*d*. at 780.

53. I*d*. at 783.

54. I*d*. at 785.

55. I*d*.

56. 749 F.3d at 784.

the court.[57] In the case of H.R. 23, the provision explicitly requires renewal, but does preclude renegotiation. Section 103(b) directs the contracts to be administered according to a 1956 Act that supports the Reclamation Act of 1939; the cited statute does not appear to eliminate the Secretary's discretion regarding renewal conditions. As there appears to be "some discretion" remaining, the act of contract renewal would require Section 7 consultation before being approved.[58]

Section 304 presents another instance of potential exemption from ESA consultation. The provision directs the Secretary to allocate water to service contractors within the Sacramento River Watershed in compliance with minimum percentages of contract quantities based on the current water year classification and the preceding year's classification.[59] After four specific water-year-type minimum percentages are stipulated, subsection (e) provides a catch-all whereby, in all other years, contractors must not receive less than twice the allocations received by south-of-Delta CVP contractors. This provision provides specific instructions for the Secretary to meet the goal of delivering contracted CVP water. Such detailed directives, while not as exacting as an exhaustive list of criteria as in H*ome* B*uilders*, do seem to represent a course of action specifically mandated by Congress, and thus exempt from the consultation requirement. A counter argument could be made, relying on NRDC *v*. J*ewell*, that subsections (d) and (e) leave room for agency discretion because they set minimum delivery percentages below 100 percent of the contracted amount. When the correct combination of consecutive water years occurs, the Secretary may be positioned to decide how much water to allocate between the fifty percent and 100 percent of normal (subsection (d)), or what allotment to south-of-the-Delta contractors will allow the twice as much provision to be satisfied. If these decisions, while minor, are viewed as meeting the "some discretion" threshold of NRDC *v*. J*ewell*, it would be sufficient to trigger the consultation requirement of section 7(a)(2) of the ESA.

57. I*d*.

58. I*d*. citing H*ome* B*uilders*, 551 U.S. at 669 ("The agency lacks discretion only if another legal obligation makes it impossible for the agency to exercise discretion for the protected species' benefit.").

59. H.R. 23 § 304.

Federalism Principles

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People."[60] The Tenth Amendment firmly articulates the line between the federal government's enumerated powers and those reserved to the state, such that "all is retained which has not been surrendered."[61] Provisions of H.R. 23 raise concerns over the extent to which the Federal Government can control California's activities. The constitutionality of such provisions will be analyzed using anti-commandeering principles established by previous judicial interpretations.

The Supreme Court endeavored to discern the proper division of authority between the federal government and the states in N*ew* Y*ork v*. U.S.[62] New York challenged provisions of the Low-Level Radioactive Waste Policy Amendments Act (LRWAP) of 1985, claiming its sovereignty was infringed in violation of the Tenth Amendment.[63] The Court held that the provision requiring the State to either take title and accept liability for waste, or regulate pursuant to Congress' direction, was an untenable choice between two options that would both go beyond the federal government's constitutional authority.[64] In presenting the state with this choice, the Court held that the act of Congress had "crossed the line distinguishing encouragement from coercion," as either action would "'commandeer' state governments into the service of federal regulatory purposes."[65]

The Court reasoned that when state conduct is commandeered, the electoral responsiveness of both state and federal officials is diminished.[66] Federal officials, responsible for locally unpopular legislation, can be insulated from political accountability while state officials, pressed into service of legislation they did not themselves create, bear the brunt of the electorate's anger.[67] This rationale is made keeping in mind the possibility of federal preemption of state law, but in this scenario, the federal decision is in full view of the public.[68] In keeping with the ideas of federalism enshrined in the 10th Amendment, the power reserved to the people

60. U.S. CONST. amend X.
61. U.S. v. Darby, 312 U.S. 100, 124 (1941).
62. New York v. U.S., 505 U.S. 144, 149 (1992).
63. I*d*.
64. I*d*. at 175
65. I*d*.
66. I*d*. at 168.
67. I*d*. at 169.
68. New York v. U.S., 505 U.S. at 169.

necessitates a local government that is responsive to local preferences, and these preferences should not be imposed without express constitutional authority.

While finding the take-title provision a violation, the Court did identify two ways in which Congress' actions were within its Constitutional authority. Congress' authority under the Spending and Commerce Clauses were held to support the LRWAP's provision of financial incentive for state compliance.[69] Additionally, when exerting Commerce Clause authority over private individuals, Congress may offer states a choice between regulating the activity under federal guidelines, or having the federal regulation preempt state law.[70] These permissible federal intrusions into areas of state governance must be kept in mind when assessing the commandeering or preemptive effect of H.R. 23.

The Court elaborated on the constitutional limits examined in *New York* when it decided *Printz v.* U.S. a short time later.[71] The Court held that the Brady Act's requirement that local Chief Law Enforcement Officers (CLEOs) perform background checks of prospective gun purchasers was unconstitutional.[72] Building upon the *New York* holding, the Court stated that Congress cannot circumvent the prohibition on compelling states to implement federal regulatory programs by instead directly conscripting state officers to administer the federal regulatory programs.[73] The Court found this provision of the Brady Act extended beyond the constitutional power granted to Congress by the Necessary and Proper Clause.[74]

The principles established in *New York* and *Printz* were subsequently discussed and applied in *Reno v. Condon*.[75] *Condon* analyzed whether a federal statute that banned state DMVs from disclosing and selling personal information without the consent of the driver violated previously stated principles of federalism.[76] The Court found the statute in question to be a valid exercise of Congress' Commerce Clause authority because it did not require the state legislature to enact any laws, nor did it require State officials to assist in the federal regulation of private individuals.[77] The Court also addressed the distinction between unconstitutional laws that regulate

69. *Id.* at 173
70. *Id.* at 173—74.
71. Printz v. U.S., 521 U.S. 898 (1997).
72. *Id.* at 933.
73. *Id.* at 935.
74. U.S. Const. Art. I § 8.
75. Reno v. Condon, 528 U.S. 141 (2000).
76. *Id.* at 143.
77. *Id.* at 151.

the states exclusively, and permissible laws of general applicability, which apply the duty to citizens as well as states.[78] The decision reasoned that the statute regulated the "universe of entities" that took part in the market in question, the DMV disclosure and sale of information and its use by private parties in commerce.[79] General applicability will add yet another layer of analysis to the validity of H.R. 23 provisions in addition to the anti-commandeering principles of N*ew Y*o*rk* and P*rintz*.

The cases discussed above provide a lens through which to view the possible federalism violations of H.R. 23. The Court's interpretations in N*ew Y*o*rk*, P*rintz*, and C*ondon* define the limits of the federal government's ability to compel state action. Alternatively, the Supremacy Clause allows federal law to preempt contrary state law, blocking state action on an issue.[80] Whether provisions of H.R. 23 compel state action or prohibit California from administering its own laws will be a key inquiry in assessing the validity of the statute.

Application of Federalism Principles to H.R. 23

California's sovereignty is challenged when H.R. 23 specifically references operation of the SWP. The SWP operates exclusively within California's borders and is managed by state agencies. Section 108, discussed at length above, provides multiple instances of Congress dictating how the SWP shall be operated.[81] Section 108 positively mandates operation of SWP in accordance with the Bay-Delta Agreement. Congress is requiring, via federal legislation, the SWRCB to operate a state project in accordance with a specific regulatory framework. The question is whether the Agreement qualifies as a federal regulation, similarly to the LRWAP the N*ew Y*o*rk* Court cited as intruding on New York state sovereignty.[82] It could be argued that by referencing a previous agreement between the state and federal authorities, H.R. 23 effectively adopts the Agreement's regulations and standards into its text. There is no practical difference between the external reference and the regulations being printed directly within Section 108. It would follow that Section 108's mandate compels a state agency to adopt and implement federal regulations in operation of a state project, running afoul of the principles set forth in N*ew Y*o*rk* and P*rintz*.

78. I*d*.
79. I*d*.
80. U.S. Const. Art. VI, cl. 2.
81. H.R. 23, 115th Cong. § 108 (2017).
82. New York v. U.S., 505 U.S. at 149.

Considering the principles set forth in N*ew Y*o*rk*, P*rintz* and C*ondon*, it is less clear how negative federal mandates for states fit into the anti-commandeering analysis. While there is certainly federal authority to preempt state law under the Supremacy Clause, the anti-commandeering cases present potential limits to Congress' ability to prohibit state activity. Section 108 prohibits any California agency from restricting the exercise of any water rights obtained pursuant to state law to "protect, enhance, or restore under the Public Trust Doctrine any public trust value."[83] The Public Trust Doctrine (PTD) states that certain resources are inherently preserved for the public use, and therefore government owns and has a duty to protect such resources in the name of the public trust.[84] The California Supreme Court embraced the PTD in N*ational A*u*dubon Society v*. S*uperior C*o*urt*, requiring State agencies to consider trust values before approving water diversions.[85] Diverting water from a natural water course requires an affirmative act, as the water of the Delta does not naturally flow into the CVP or SWP. By prohibiting the state from "restricting the exercise of an appropriative water right," Section 108 is in effect compelling the state to make water deliveries in accordance with federal regulations. The federal regulations in this instance do not recognize the public trust values central to California water policy.

The uncertainty in applying the anti-commandeering and supremacy principles to negative mandates also impacts the public's ability to be informed of regulatory decisions. N*ew Y*o*rk* discusses the negative effect commandeering has on electoral accountability.[86] When state officials must regulate an affirmative act at the direction of the federal government, they are potentially subjected to the brunt of public discontent over legislation they did not create.[87] The opinion describes how preemption in "full-view" can properly direct electoral repercussions toward federal lawmakers. If California officials are prohibited from implementing the PTD in water use decisions, thus increasing diversions under the guidance historically unclear water rights, will it be clear to California citizens which authority made the decision? It seems the N*ew Y*o*rk* Court was referencing just such a scenario when it discussed the purpose of anti-commandeering principles.

83. H.R. 23 § 108(b).

84. National Audubon Society v. Superior Court, 33 Cal.3d 419, 425 (1983).

85. I*d*. at 426.

86. New York v. U.S., 505 U.S. at 169.

87. I*d*.

Conclusion

In summation, H.R. 23, as currently written, poses multiple challenges to California's ability to regulate state water resources in an environmentally protective manner.The statute includes numerous "clear Congressional directives" that aim to supplant state water law under the Court's *California v.* U.S. holding. This analysis will depend on the type of water right that is subject to the Congressional directive. The state can arguably retain control over proprietary rights, whereas a Congressional directive can control allocation decisions. Another Supreme Court prism of analysis focuses on H.R. 23 provisions that remove agency discretion to a point where ESA consultation is not required. The Court's *Home Builders* decision does not precisely define the boundaries between discretionary and nondiscretionary actions. A strong argument can be made that any trace of agency discretion sustains the consultation requirement, and such an argument is warranted when viewing sections of H.R. 23. Lastly, the anti-commandeering rules established by past Court decisions provide another framework for analyzing the validity of H.R. 23. The statute appears to push the bounds of Congressional authority over state activities, hovering around the uncertainty between compelled state action and inaction.

H.R. 23, regardless of its final form or enactment, represents a threat to California's ability to implement its laws regarding state water resources. This paper has sought to provide a platform upon which the statute can be analyzed. The lengthy document surely presents more opportunities for dissection than this brief paper covers. Issues of federalism will surely predominate the discussion surrounding environmental management and sustainable resource use as California moves forward in the Trump Era.